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**Hanson Aggregates Central, Inc. and International Brotherhood of Teamsters Local Union 988, AFL-CIO, CLC.** Cases 16-CA-20885-1, 16-CA-20885-2, 16-CA-20885-3, 16-CA-20885-4, 16-CA-20885-5, 16-CA-20885-6, 16-CA-20885-8, 16-CA-20885-10, 16-CA-20885-11, 16-CA-20885-12, and 16-RC-10286

July 26, 2002

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On November 30, 2001, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions,<sup>3</sup> to adopt the recommended Order as modified,<sup>4</sup> and to direct a second election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hanson Aggregates Central, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified by substituting the attached notice for that of the administrative law judge.

<sup>1</sup> There are no exceptions to the judge's recommended dismissal of certain 8(a)(1) allegations and election objections.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> Member Bartlett finds no need here to decide whether the Board should adhere to the standard for effective repudiation of misconduct set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), inasmuch as he agrees with his concurring colleague that the Respondent's recidivist misconduct precludes finding effective repudiation in any event.

<sup>4</sup> We shall substitute a new notice in accordance with *Ishikawa Gas-ket America, Inc.*, 337 NLRB No. 29 (2001).

DIRECTION OF SECOND ELECTION

IT IS FURTHER DIRECTED that Case 16-RC-10286 is severed and remanded to the Regional Director for Region 16 for the purpose of conducting a new election at such time as he deems appropriate. A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Teamsters Local Union 988, AFL-CIO, CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by

the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. July 26, 2002

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Wilma B. Liebman, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring in part.

I join my colleagues in adopting the administrative law judge's unfair labor practice findings. I agree with my colleagues that the Respondent, by Production Manager Lee Surface, unlawfully instructed employee Frank Davault to remove a union button and issued him disciplinary warnings on March 1 and 7, 2001. I also agree that the conduct was not effectively repudiated. In this latter regard, I do not rely on *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), for my decision. As I explained in my partial dissent in *Webco Industries*, 327 NLRB 172, 174 ((1998), enfd. 217 F.3d 1306 (10th Cir. 2000)), I believe that the stringent *Passavant* standard for determining whether corrective action negates the need for a remedial decree discourages prompt relief in cases where there is a timely and effective repudiation of an unlawful labor practice. In *Webco*, I found that the respondent unlawfully suspended an employee, but promptly revoked the suspension and gave her full backpay. In my view, the respondent effectively resolved the unlawful suspension and, thus, protected the Section 7 rights of the injured employee and all of the respondent's employees.

Here, in contrast, I find that the Respondent did not effectively repudiate the unlawful instruction and warning. As fully described by the judge, on March 1, the Respondent unlawfully issued a written warning to Davault instructing him, in pertinent part, not to "solicit for the Union on Company time . . . . This means wearing buttons with union slogans." On March 7, the Respondent presented Davault with a written verbal warning that stated that it retracted and replaced the March 1 warning. The March 7 warning stated, in pertinent part, "Frank, you can wear your button with the union slogan if you want." However, less than 1 month after this incident, Sales Supervisor Mike Leathers committed virtually the same unfair labor practice by directing employee Chris

Harris to remove union insignia from his hardhat. Thus, notwithstanding the Respondent's purported retraction of the unlawful instruction to Davault on March 7, it is clear that the Respondent continued to maintain an unlawful prohibition against wearing union insignia.

Accordingly, I join my colleagues in adopting the judge's unfair labor practice finding and issuing a remedial order.

Dated, Washington, D.C. July 26, 2002

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Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union  
 Chose representatives to bargain with us on your behalf  
 Act together with other employees for your benefit and protection  
 Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge for engaging in protected concerted activity regarding wages and working conditions.

WE WILL NOT deprive you of the benefit of a blackboard in the tanker drivers' room, remove nonwork-related material posted by you at the Renwick and Bayport ready mix plants at which you had previously been permitted to post nonwork related materials, promulgate rules prohibiting the posting of pronoun literature at the Fulton, Renwick, and Bayport ready mix plants at which you had previously been permitted to post nonwork related materials, attempt to confiscate pronoun literature from any of you, or prohibit you from discussing the Union on company property.

WE WILL NOT prohibit you from wearing pronoun insignia.

WE WILL NOT solicit your grievances and imply that we will remedy them in order to dissuade you from supporting the Union.

WE WILL NOT threaten that you will be terminated if you sign a union authorization card, that Lorry Owned by Driver (LOD) employees will be terminated if you select the Union as your collective-bargaining representative, or that we will close if you select the Union as your collective-bargaining representative.

WE WILL NOT warn or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters Local Union 988, AFL-CIO, CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, replace the blackboard in the tanker drivers' room at the Fulton plant.

WE WILL, within 14 days from the date of the Board's Order, remove from our files the unlawful warnings issued to Jimmy Carriere and Frank Davault, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

#### HANSON AGGREGATES CENTRAL, INC.

*Tamara J. Gant, Esq.*, for the General Counsel.

*David Fielding, Esq.*, for the Respondent.

*Byron M. Buchanan, Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. I heard this case in Houston, Texas, on July 9 through 12 and August 22, 2001, pursuant to a consolidated complaint that issued on May 25, 2001.<sup>1</sup> The complaint, as amended, alleges various violations of Section 8(a)(1) of the National Labor Relations Act (the Act), the granting of a wage increase in order to discourage employee union activity and the issuance of warnings to two employees because of their union activities in violation of Section 8(a)(1) and (3) of the Act.<sup>2</sup> On May 29, The Regional Director issued an order directing a hearing on objections to con-

<sup>1</sup> All dates are in 2001 unless otherwise indicated.

<sup>2</sup> The charge in Case 16-CA-20885-1 was filed on January 24 and was amended on March 29, the charge in Case 16-CA-20885-2 was filed on February 12 and was amended on March 29, the charge in Case 16-CA-20885-3 was filed on March 6 and was amended on April 29, the charge in Case 16-CA-20885-4 was filed on March 6, the charges in Cases 16-CA-20885-5 and 16-CA-20885-6 were filed on March 7, the charges in Case 16-CA-20885-8 and 16-CA-20885-10 were filed on March 16, the charge in Case 16-CA-20885-11 was filed on March 29, and the charge in Case 16-CA-20885-12 was filed on April 3.

duct affecting the election in Case 16-RC-10286 and consolidated that case for hearing with the unfair labor practice cases. Respondent's answer denies all violations of the Act. Although I shall recommend dismissal of some allegations, I find that several of the complaint allegations do have merit.

On the entire record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following<sup>3</sup>

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, Hanson Aggregates Central, Inc., is a Texas corporation engaged in the manufacture of building materials. It annually purchases and receives at its Houston, Texas facilities goods and materials valued in excess of \$50,000 directly from points located outside the State of Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Teamsters Local Union 988, AFL-CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

Hanson Aggregates, the Company, acquired Pioneer Concrete in April 2000. Its principal product is ready-mix concrete. This concrete is delivered to customers from 12 ready-mix concrete plants in and around Houston, Texas. Although every plant was mentioned at some point in the hearing, the bulk of the testimony related to the Fulton, Jersey Village, Renwick and Bayport plants. Senior Production Manager (North) David Hammaker was the management official responsible for the Jersey Village and Fulton plants. Senior Production Manager (South) Joe (Topper) Moet was responsible for the Renwick and Bayport plants. Dry cement and fly ash are provided to the ready-mix plants by tanker drivers who are headquartered at a separate facility at the Fulton plant where they are supervised by Tanker Dispatch Manager Hal McAfee. The senior management official of the Company in the Houston area is Vice President and Regional Manager of Houston Concrete Operations Rob Van Til.

Most employees of the Company are hourly employees who drive company owned trucks. Some of the ready-mix drivers, referred to as LOD employees (Lorry Owned [by] Driver, an Australian term) own their own trucks. For several months after the acquisition by Hanson Aggregates, employees worked under Pioneer's work rules and were paid under the Pioneer compensation system. Although work rules instituted by Hanson

<sup>3</sup> Counsel for the General Counsel has moved to strike the Respondent's brief that was timely filed on September 26 with the Regional Director but not the Division of Judges. Respondent sent the brief to the Division of Judges on September 27, and it was received on September 28. Counsel for the General Counsel was properly served. There has been no prejudice to any party. I shall exercise my discretion and consider the brief of Respondent, and I deny the General Counsel's motion. *Godsell Contracting*, 320 NLRB 871 at JD fn. 2 (1996).

bear the date of December 15, 2000, I credit the employee testimony that these rules were not promulgated until April or May 2001. In October 2000, Hanson addressed the Pioneer pay structure and began taking the actions necessary to bring the Pioneer pay system into conformity with Hanson's pay system.

The record does not establish when union organizational activity actually began at the Hanson facilities, but Vice President Van Til acknowledged that he was aware of union activity in early January, prior to when the revised pay system was announced to employees. The Union filed the representation petition in Case 16-RC-10286 on February 13, and the election was held on March 30. The tally of ballots reflects that the Union received 104 votes whereas 109 employees voted for no representation. There were 6 challenged ballots. All were challenges by the Union. At the hearing herein, the Union withdrew the challenges.

In addressing the various allegations of the complaint, I shall first address the wage increase of January 15 that is alleged to have violated Section 8(a)(1) and (3) of the Act and then the meeting at the Jersey Village plant with employees who perceived the new pay plan as a pay decrease. I shall next address the allegations relating to union literature, the alleged discriminatory warnings, the remaining Section 8(a)(1) allegations, and finally the Union's objections that are not coextensive with any complaint allegations.

#### *B. The Wage Increase*

On December 28, 2000, the Company published a memorandum to all ready-mix drivers announcing its revised pay plan effective January 14. It included a raise in base pay but discontinuation of the Pioneer productivity bonus that had been computed upon cubic yards of concrete delivered for each hour worked. Under the Hanson system, the bonus was converted to a weekly safe load bonus computed on a sliding scale, \$10 a week for 15 to 19 deliveries, \$25 for 20 to 24 deliveries, up to 40 deliveries as shown on the memorandum. On January 15, the Company published another memorandum in which Vice President Van Til states, "I have decided to make the following changes to the driver compensation program as announced on December 28." The changes reflect a 25-cent-an-hour increase in the base pay of all employees. This memorandum followed a meeting, which appears also to have occurred on January 15, in which management officials, including Van Til and Director of Human Resources Donna Ashabranner, met with the Company's mentor drivers, a group of selected experienced unit employees, and explained the program "because we weren't just giving a pay raise but we were going to a whole new system." Van Til testified that he was concerned that the new system would "be equitable across the board." Following the meeting, Van Til decided that the change was not equitable and "to make it equitable we needed to put another 25 cents on to the base pay across the board, and that is what we did."

Employee Derrick Moore, the mentor driver at the Jersey Village plant, was present at this meeting. The following day, January 16, the drivers at Jersey Village faxed to Van Til an alternate pay plan. Shortly after this, Ashabranner came to the plant and, with Senior Production Manager David Hammaker, explained the new system. Employee Clarence Wright con-

firmed that Ashabranner had the memorandum reflecting the 25-cent increase which was included in her explanation and calculations. Despite the adjustment, the drivers complained that their pay was being cut. Upon hearing the drivers' concerns, Ashabranner initially agreed with them that, if they had a high volume week, they "could possibly end up making less money." She reported this to Van Til. Upon reviewing her calculations, Ashabranner realized that the effect of the Christmas bonus and safe load bonus had not been properly computed. She returned the next day, January 17, and explained the revised calculations. The Jersey Village drivers were still dissatisfied and vocal in their criticism of the new pay plan. Employee Clarence Wright testified that, even after Ashabranner's re-explanation on January 17, the drivers were receiving a pay cut of between \$70 and \$100. There is no evidence of the reaction to the announced plan at any location other than the Jersey Village plant.

The General Counsel presented no pay records from representative employees reflecting their average earnings under the Pioneer bonus system and the Hanson system which, as implemented, included the additional 25 cents in base pay.

The complaint, in paragraph 29(a), alleges that the pay increase of 25 cents an hour on January 15 violated Section 8(a)(1) and (3) of the Act. If it were established that the Respondent granted this benefit in order to discourage employee union activity, even though it was granted before a representation petition was filed, it would be unlawful. *Capitol EMI Music*, 311 NLRB 997 (1993). Counsel for the General Counsel argues that the wage increase was given to "quell . . . [union] activities" but does not address the uncontradicted testimony that, in actuality, this was a pay cut that the Jersey Village drivers protested. I suppose it could be argued that, without the 25-cent adjustment, the employees would have taken an even greater pay cut, but I have difficulty describing that as a benefit in the traditional sense. The Company had, prior to any union activity, determined to replace the Pioneer pay system. Although aware of some union activity among its employees, it adjusted the new pay system "to make it equitable." There is no evidence that union activities played any part in the decision to make this pay adjustment. The decision to increase the base pay was made after Van Til met with the mentor drivers. There is no evidence that the Union was mentioned at any time in the discussion with the mentor drivers or that the Union played any part in his decision. Despite the vocal dissatisfaction of the drivers, none of whom mentioned the Union in their protestations, the Company made no further adjustment to its pay structure. I credit Van Til's explanation that the 25-cent adjustment was to make the change in pay systems equitable. The Company proceeded to do that which it would have done if there had been no union activity. I shall recommend that this allegation be dismissed.

#### *C. The Meeting of January 19*

At the reexplanation of the pay system on January 17, the drivers at Jersey Village continued to express their dissatisfaction with the new pay system. On January 19, Operations Manager Andy Dorris, Safety Manager Ray Rucker, and Hammaker met with the employees.

Employee Joel Lebron recalled that Dorris “seemed pretty upset.” He informed the employees that they “were creating a ruckus . . . it needed to stop or we would be separated from the Company.” Someone asked what he meant by separated and mentor driver Moore explained that it was “a sugar coated word for being terminated.” At that point Rucker stated that termination was an ugly word and he did not want to use it, but that “if anybody feels that they need to be released from this Company right now, we can do it right now.” Rucker was carrying with him change of status forms, the document used for various personnel actions including termination.

Employee Clarence Wright recalls that Dorris stated that he needed to know who was going to “be with us or not because the ruckus needs to stop . . . or we will have to separate you from the Company.” Rucker informed the employees that they had been sent by Van Til to “give us a message to stop the ruckus over here at JV [Jersey Village.]”

Mentor driver Moore recalls that Dorris said that there was “too much commotion around here raising a ruckus, . . . [that] you guys aren’t going to get any more money from us so you might as well stop asking, . . . and [that], if you don’t like it, then you can be separated from the Company.” Moore asked Dorris whether separated was “a sugar coated way of saying we could be terminated,” and Dorris replied, “[W]e don’t like to use the word terminate.” Moore recalled that Dorris then stated that if the employees did not “like what’s going on here, then somebody, whoever, just speak up,” as he reached for a book of change of status forms.

Employee Juan Solis, who testified through an interpreter, recalled that Dorris began the meeting by asking, “[W]ho was with the Company and who was not with the Company.” Solis testified that Dorris then mentioned separation, “I think he was mentioning a separation having to do with drivers who are trying to bring in the Union.” No other driver attributed any comment about the Union to Dorris and I find that Solis misunderstood what Dorris stated.

Dorris testified that he began by trying to explain the new pay plan but, as he did so, the drivers were complaining that it was not enough, they wanted more money. He acknowledged that he told them that “if they weren’t happy, you know, they could do whatever they would like to do as far as leaving employment.” Although Dorris denied threatening the employees with termination if they continued to discuss wages and working conditions, he did not deny using the terms “commotion” or “ruckus.”

Rucker acknowledged that he carried change of status forms with him and that, after Dorris finished speaking, he stated that “if anyone wished to resign at this time . . . we would cut the ties then.”

The complaint, in paragraph 11, alleges that Dorris interrogated employees and threatened separation if they continued to discuss wages, hours, and working conditions. Statements that employees should seek work elsewhere when the employees are engaging in protected activity because they are dissatisfied with their terms and condition of employment violate the Act. *General Fabrications Corp.*, 328 NLRB 1114, 1120 (1999). Thus, even if I were to credit Dorris, his admitted comments establish a violation of the Act. I credit the mutually corroborative

testimony of Lebron, Wright, and Moore and find that Dorris did inform the employees that the “ruckus” needed to stop or the employees would be terminated. Any doubt regarding the meaning of that comment was erased by the presence of Rucker with change of status forms and his stated willingness to “cut the ties” at that meeting. I do not find Dorris’ rhetorical statement that he needed to know who was going to “be with us or not” constituted interrogation. There was no polling of employees and the “be with us” statement was immediately followed by the threat to terminate any employees who continued the “ruckus.” Thus, I shall recommend that the allegation regarding interrogation be dismissed. I find that Dorris did threaten employees with termination if they continued to engage in the protected concerted activity of discussing wages and working conditions and in so doing violated Section 8(a)(1) of the Act.

#### *D. The Posting of Union Literature*

The complaint, in paragraph 13, alleges the replacement of a blackboard and installation of a glass-covered locked bulletin board at the Fulton plant and, in paragraphs 14(a), 15, 16(a), 17, and 18, it alleges the removal of union literature at the Fulton, Renwick, Jersey Village, and Bayport ready-mix plants.

The Company certainly may install whatever additional bulletin boards it wishes to install, and I find no violation with regard to such installation. The unfair labor practice issue is whether employees were deprived of the preexisting benefit of posting on bulletin boards and whether the Company removed union literature at plants at which employees had previously been permitted to post personal items. Board precedent on this issue is clear. An employer may not, in response to organizational activity, change its policy regarding employee use of bulletin boards. When an employer has permitted its employees to post advertisements regarding items for sale and other announcements, modification of that policy in response to organizational activity by prohibiting the posting of “any literature . . . unrelated to their work” deprives employees of a benefit, is coercive, and violates Section 8(a)(1) of the Act. *Bon Marche*, 308 NLRB 184, 185 (1992).

The record is replete with generalized testimony from employees, including tanker driver Jimmy Carriere, who assert that they saw noncompany literature posted at various plants and supervisors, including Vice President Van Til, who testified that they either did not recall seeing or did not see such literature. I do not credit any testimony that is contrary to my findings herein. Much testimony related to locations not alleged in the complaint. Counsel for the General Counsel stated that such evidence was introduced as background regarding the Company’s past practice, not a specific allegation. As I find herein, the practice at the plants differed. This decision shall not address testimony relating to locations not set out in the complaint.

The Fulton plant is actually two plants. One is a ready-mix plant and the other, across a railroad track, is the dispatch center for the tanker drivers. In September or October 2000, the tanker drivers moved to a new drivers’ room. Tanker driver Carriere recalled moving both a blackboard and cork bulletin board from the former drivers’ room, in a building referred to

as the “shack,” to the new drivers’ room. Although Carriere testified generally to for sale notices being posted, it is unclear whether those postings were in the old or new drivers’ room. The only specific instance he mentioned in the new room occurred in January when he wrote on the blackboard that he needed a saddle. Tanker driver Domingo Ruiz recalled only the blackboard, not the cork board, being placed in the new drivers’ room. He testified that employees would put messages, including notices of cars for sale or dates of barbecues, by “writ[ing] it up on that chalk board.” In February, Carrier posted union literature. Tanker Dispatch Manager Hal McAfee took it down and informed him that he did not want to see any more union materials posted on company property. In March, a locked glass bulletin board was installed in the new drivers’ room and the blackboard was removed.

Tanker Dispatch Manager McAfee admitted that a locked glass bulletin board was installed. He denied that employees had written messages on the blackboard, and he testified that the only nonwork material that he observed on the blackboard related to the Union. He testified that, when this began to occur, instructions that he had left on the blackboard were being erased. The foregoing testimony establishes that McAfee was familiar with the manner in which employees had used the blackboard. I credit the mutually corroborative testimony of Carriere and Ruiz and find that employees had, prior to union activity, written messages unrelated to company business on the blackboard. McAfee testified that, when his instructions were erased, he had the locked glass bulletin board installed and removed the blackboard.

McAfee’s removal of the literature and instruction to Carriere not to post pronoun literature are alleged in paragraphs 14(a) and (b) of the complaint to violate Section 8(a)(1) of the Act. There is no probative evidence that employees had posted literature in the new drivers’ room prior to the union organizational campaign. Rather, messages were written on the chalk blackboard, as in January when Carrier was seeking a saddle. In the absence of probative evidence that employees had posted literature, rather than writing messages on the blackboard, in the new drivers’ room, I shall recommend that that paragraph 14(a) of the complaint be dismissed. As hereinafter discussed, employees had been permitted to post literature at several plants including the Fulton, Renwick, and Bayport ready-mix plants. McAfee’s instruction that he did not want to see union materials posted on company property was not limited to the new drivers’ room. By its terms, it applied to all company property, including plants at which employees had been permitted to post literature. With regard to those plants, it deprived employees of a benefit that they had previously enjoyed and violated Section 8(a)(1).

I find that the removal of the blackboard upon which employees had written messages, as alleged in paragraph 13 of the complaint, deprived employees of a method of communication in which they had been permitted to engage. Consistent with the holding in *United Parcel Service*, 304 NLRB 693 (1991), cited by the General Counsel, I find that the evidence establishes a prima facie case that the employees’ protected conduct was a motivating factor in removing the blackboard. I further find that the Respondent has not shown that it would have taken

the same action in the absence of employee union activity. Assuming that McAfee’s instructions were being erased, he assured himself of a secure means of communication by installing a locked glass bulletin board. Having done so, there was no need to deprive employees of the blackboard that they had used prior to the advent of any union activity. I find that the removal of the blackboard violated Section 8(a)(1) of the Act.

In the drivers’ room in the Fulton ready-mix plant, there was a cork bulletin board where employees could, according to employee Kenneth Allen, “stick those thumbtacks in and place stuff up.” He recalls seeing advertisements of cars and tires for sale and upcoming church events. Although safety meetings, conducted by supervisors, were held in the drivers’ room, none of these items were removed from the cork bulletin board. After organizational activity began, the cork bulletin board was removed and replaced by a locked glass covered bulletin board. In late February, having been deprived of the cork bulletin board, Allen posted union literature on the wall next to the glass bulletin board. Batchman Ray Ozzene, an admitted supervisor, removed the literature and told Allen, “[N]o union propaganda on the Company property.” Ozzene did not testify. I credit Allen.

Paragraph 16(a) of the complaint alleges that Ozzene removed literature from the wall and 16(b) alleges that he told an employee that it was not permissible to post “union propaganda on Company property.” The complaint does not allege the removal of the bulletin board. Allen was not privileged to post literature wherever he wanted after the cork bulletin board was removed from the ready-mix drivers’ room. Thus I find no violation in the removal of literature from the wall in the absence of evidence that, prior to any union activity, employees had posted nonwork matters on the walls. Although the prohibition against possession of union propaganda on company property is broader than the complaint allegation regarding posting, it obviously encompasses posting since any literature that was posted would have to first be carried onto company property. Insofar as employees previously had been permitted to post literature at the Fulton plant, as well as at the Renwick and Bayport ready-mix plants, I find that the restriction imposed upon Allen by Ozzene violated Section 8(a)(1) of the Act.

Employee Anthony Adams testified that, at the Renwick plant, there had been a cork bulletin board in the drivers’ room and employees had advertised “cars or motorcycles or boats or whatnot.” Every year, Adams’ mother-in-law “walks for the March of Dimes,” and he took donations for her. He received contributions for this charitable cause from employees as well as Batchman Ted Francis and Senior Production Manager Topper Moet. After his mother-in-law completed the walk “she made the guys a cake and sent them a certificate for thanks. And we posted it up and it would stay up there until the next year.” In the year 2001, the certificate remained up for less than a month because Moet and Francis “started taking stuff down when we started posting union material.” The restroom at the Renwick plant is located in the drivers’ room, thus, prior to organizational activity, items that were posted were in plain view. Beginning in February and March, Moet and Francis would “remove the [union] literature as they were leaving.” Moet denied seeing the certificate of thanks, denied that an-

employees posted nonwork items, and admitted taking down literature not related to the Company. He did not deny making a contribution on behalf of Adams' mother-in-law. Respondent's witness, employee Roger Longoria, also denied seeing the certificate. I credit Adams. Respondent argues that, even if literature regarding the March of Dimes was posted, Board precedent permits exemptions for solicitation by specific charities. That argument is not on point. The Respondent has made no claim that there was any such exemption and the posting was not made on behalf of an approved charity, it was by Adams on behalf of his mother-in-law.

There is no probative evidence of nonwork-related postings at the Jersey Village plant. Although employee Jorge Gutierrez testified to such postings, General Counsel's witness Joel Lebron testified that employees were not allowed to post nonwork-related materials at Jersey Village. Employees Wright and Moore, both of whom work at Jersey Village and testified to the events of January 19, were not asked about the past practice regarding posting at that plant. I do not credit the uncorroborated testimony of Gutierrez, and I shall recommend that paragraph 17 of the complaint be dismissed.

Employee Frank Davault, who is assigned to the Bayport plant, testified that Production Manager Lee Surface, on or about March 1, removed union literature that he had posted on the cork bulletin board in the drivers room at that plant. Prior to March, employees had posted, and Davault had observed, comics out of newspapers and notices of items for sale including vehicles and exercise equipment. After March 1, the cork bulletin board was removed and replaced by a locked glass covered bulletin board. Surface did not testify. I credit Davault.

Pioneer had no written rule regarding posting. Contrary to the testimony of Van Til, the record establishes, and I have found, that the posting practices differed at the Respondent's plants. Prior to employee union activity, employees were permitted to post whatever they chose to post at the Fulton, Renwick, and Bayport ready-mix plants. The removal of literature by Moet and Francis at the Renwick plant and by Surface at the Bayport plant violated Section 8(a)(1) of the Act as alleged in paragraphs 15 and 18 of the complaint. See *Venture Industries*, 330 NLRB 1133, 1134 fn. 7 (2000).

#### *E. Confiscation of Union Literature*

On March 15, at a safety meeting in the tanker drivers' room at the Fulton plant, employee Carriere brought a stack of union literature. He posted two union fliers on the wall. When Manager McAfee entered the room, he saw the literature on the wall. He removed one piece and tore it up. He requested an employee, identified in the record as Jake, to remove the flier on the back wall. Carriere told him not to, and another employee removed it. At that point, McAfee noticed the stack of literature in front of Carriere and reached out as if to take it. Carriere extended his hand to cover the stack of literature and said, "[N]o, these stay." McAfee testified that Carriere physically slapped his hand as he reached for the stack of literature, stating that the literature was his.

The complaint, in paragraph 20, alleges that the removal of the union flier from the wall, instructing an employee to remove a flier from the wall, and the attempted confiscation of

union literature from Carriere violated the Act. There is no probative evidence that employees had, prior to union activity, been permitted to post items on the wall of the new tanker drivers' room. As discussed above, employees had communicated on the blackboard, the removal of which violated the Act. That unfair labor practice did not give employees license to begin using the wall of the drivers' room in any manner they saw fit. McAfee's removal of literature from the wall and instructions in that regard did not violate the Act, and I shall recommend that those allegations be dismissed.

The confiscation of pronoun literature from employees interferes with their protected rights and violates the Act. *Romar Refuse Removal*, 314 NLRB 658, 665 (1994). The Respondent argues that McAfee "had a right to clear the table of litter," that Carrier was not disciplined for striking McAfee's hand, and that no literature was confiscated. There is no evidence that the literature was litter; it was in a stack in front of Carriere. If I were to credit McAfee, I would find that Carriere had to actually engage in physical violence to maintain possession of the literature. If I were to credit Carriere, I would find that Carriere had to directly confront his supervisor and physically protect the literature by placing his hand over it. Regardless of which version of the incident I credit, it is uncontraverted that McAfee attempted to confiscate union literature that was in a stack in front of Carriere and that his actions caused Carriere to confront his supervisor in order to maintain possession of the literature. I find that McAfee's attempted confiscation of union literature from Carriere interfered with his right to possess union literature and violated Section 8(a)(1) of the Act.

#### *F. Warnings*

In early February, tanker driver Jimmy Carriere heard from a fellow employee that employee Willie Johnson, who was also a tanker driver, had been talking about the employees' union activities to the batchman at the Sugarland plant. When Carriere parked his tanker truck at the end of the workday at the Fulton plant, he testified that Johnson "started hollering" at him and that he pointed his finger in Johnson's face and told him that he needed "to keep out of other people's business." Three days later Tanker Dispatch Manager McAfee called Carriere into the office. Fulton Plant Manager Jim Nowakowski was present. McAfee told Carrier that Johnson had made a formal complaint against him, reporting that Carriere had pointed his finger at him "like a gun." Carriere admitted pointing his finger but denied doing so "like a gun." McAfee then informed Carriere that "it was forbidden to talk about union activities on Company property, that they would be writing everybody up, giving time off, and docking pay." Carriere was given a written warning for threatening a fellow employee. Carriere wrote on the warning that he did not start the argument, that Johnson had yelled at him and that he did not point his finger at him like a gun. He further noted that he was told to "not talk about union organization on Co[mpany] property."

Johnson testified that Carriere began the argument by accusing him, Johnson, of telling three people that a fellow employee had signed a union card. Johnson denied doing so and testified that Carriere disputed his denial. Johnson then told Carriere that if he did not stop harassing him he would report him. Carriere

then pointed his finger, said, “[T]his is for you,” and bent his finger as if pulling the trigger on a gun.

McAfee acknowledged that he prepared the warning after receiving Johnson’s report and prior to calling Carriere into the office. When Carriere came into the office McAfee advised him of Johnson’s complaint. Carriere admitted pointing his finger, but denied doing so like a gun. McAfee gave Carriere the warning “after the conversation.” McAfee denied that he told Carriere that he could no talk about the Union on company property, testifying that he only told Carriere that he could not talk about the Union on company time. This testimony is belied by the comment that Carriere wrote on the warning, noting that McAfee had instructed him not to “talk about union organization on Co[mpany] property.” The foregoing instruction to Carriere, whom I credit in this regard, was accompanied by a threat of discipline. This gag order that was not limited to working time and threat are alleged as unlawful in paragraphs 12(a) and (b) of the complaint, and I so find.

The complaint, in paragraph 29(b) alleges that the warning to Carriere on February 5 violated Section 8(a)(3) of the Act. Consistent with the criteria of *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I find that Carriere was engaged in union activity and that the Respondent was aware of that activity and bore animus towards it. The warning was clearly an adverse action. Thus, the General Counsel has established a prima facie case. There is no evidence that the Respondent tolerates one employee threatening another. Carriere was not engaged in protected activity, such as solicitation of union cards, where the Respondent’s mistaken, albeit reasonable, belief would be no defense. *Keco Industries*, 306 NLRB 15, 17 (1992). The Respondent received a report from Johnson that he had been berated and threatened. By Carriere’s own admission he told Johnson “to keep out of other people’s business.” Johnson accused Carriere of pointing his finger at him “like a gun,” and Carriere admitted pointing his finger, but not like a gun. When asked, on cross-examination, if pointing his finger was “kind of a fighting gesture,” Carriere answered, “In some way. Yeah.” The General Counsel’s brief omits this acknowledgement by Carriere. I am mindful that McAfee contemporaneously published an unlawfully broad rule prohibiting Carriere from talking about union activities on company property. Although the publication of this rule was unlawful, it does not taint the warning. I cannot find that the Respondent acted discriminatorily in choosing to believe Johnson. See *GHR Energy Corp.*, 294 NLRB 1011, 1013–1014 (1989). Pioneer’s work rules, under which the Respondent was operating, provide that no employee “shall intimidate or coerce any other employee.” I find that the Respondent has established that it would have taken the same action in the absence of Carriere’s union activity. I shall recommend that this allegation be dismissed.

On March 7, Carriere received another warning. The testimony regarding this warning is in sharp conflict. Carriere testified that, when he arrived with his tanker truck at the Ellington plant, he was confronted by Manager McAfee and Production Manager Lee Surface. McAfee told Carriere that he was writing him up for “posting union material at the Addicks plant.” Carriere denied doing so. McAfee stated that he had a witness and

that the warning was for violating the company policy of posting union literature on company property. Carriere testified that he had not posted literature at Addicks on March 6 or 7, but he admitted that he had posted literature at the Addicks plant after March 7. I credit Carriere’s testimony that he had not posted literature at the Addicks plant on March 6 or 7. Even if he had posted literature, Vice President Van Til testified that “[i]n the past, . . . we really never disciplined any one for posting things. We’ve simply taken the posting down.”

McAfee testified that the warning given to Carriere on March 7 was for leaving his truck unattended when it was filling a silo at the Addicks plant with cement. Cement, before being mixed, is a fine dust, and it is blown into the silos from the tanker trucks with high pressure air. Drivers are not to leave their trucks unattended when this process is occurring. They monitor the gauges to assure that the silo is not overfilled and that there is no spillage. No witness who purportedly observed Carriere leave his truck testified. McAfee testified that he received the report by telephone from the batchman at Addicks whom he identified as “Neil or Nile, I don’t know his last name.” He testified that Carriere denied leaving his truck. Carriere again denied leaving his truck at this hearing, and I credit his denial.

The complaint, in paragraph 32, alleges that, in issuing this warning to Carriere, the Respondent violated Section 8(a)(3) of the Act. Carriere testified that he was accused of and denied posting literature. McAfee testified that Carriere was accused of and denied leaving his truck. Unlike the situation in which Johnson had personally accused Carriere of the conduct for which he was warned and Carriere admitted the confrontation and pointing his finger, Carriere categorically denied the conduct of which he was accused on March 7. The cryptic “violation of company policy” on the warning issued to Carriere could refer to either leaving the truck or posting literature at the Addicks plant.

Accepting the Respondent’s version of the incident for the purpose of analysis only, there is no probative evidence that Carriere left his truck unattended. The telephonic report of the batchman is hearsay. No witness to the conduct testified. Upon receiving Carriere’s denial, the Respondent could have no reasonable belief that he had committed the infraction alleged. Although the warning document has various boxes to be checked reflecting the nature of the violation, including safety, carelessness, disobedience, or work quality, none were checked, giving credence to Carriere’s testimony that the warning was not related to his job performance.

I find that the warning was issued to Carriere for allegedly posting union literature at the Addicks facility on either March 6 or 7. There is no probative evidence that he did so. Even if he had, Van Til acknowledged that, prior to union activity, the Respondent had not disciplined employees for posting things, “[w]e’ve simply just taken the posting down.” A *Wright Line* analysis is applicable in dual motive cases. When the reason given for an action is either false, or does not exist, Respondent has not rebutted the General Counsel’s prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The Respondent never identified or produced the unidentified witness to the alleged posting to whom McAfee referred after Carriere denied



posting union literature at the Addicks plant. I find that the warning issued to Carriere on March 7 for “violation of company policy” was pretextual and was issued to him in retaliation for his union activities. In so doing the Respondent violated Section 8(a)(3) of the Act.

Employee Frank Davault began wearing union buttons and stickers on March 1. On March 1, Bayport Production Manager Lee Surface removed union literature that Davault had posted in the drivers’ room. Davault, who saw him do so, protested that he could not do so, and Surface informed Davault that he could. Thereafter, Davault was summoned to the batch house office. Batchman Jeff Merriman was present with Surface. Surface presented Davault with a written warning stating:

Frank, you cannot solicit for the Union on Company time. This means wearing buttons with union slogans, posting fliers with union information that is not put out thru the Company. All soliciting for the Union on Company time must stop now.

Davault wrote that he would agree, “at this time . . . because I do not know for sure if this is legal or not.”

On March 7, Davault was again summoned by Surface. Senior Production Manager Moet was present on this occasion. Surface presented Davault with a written verbal warning that stated that it retracted and replaced the warning of March 1. It states:

Frank you can wear your button with the union slogan if you want; however, you cannot solicit union material during work time. All solicitation and distribution of union material must be done during nonworking time.

Davault wrote on this warning that he would only do what he was legally allowed to do.

On March 23, Surface again called Davault to the batch house office. Merriman was present. Surface told Davault to stop putting union fliers up and that he “should stop talking to drivers and handing them fliers because some of the them had filed harassment charges” on him. Davault asked who had done so, and Surface replied that he could not tell him. Davault was handed a written warning which, like the warning issued to Carriere on March 7, does not describe the offense that Davault allegedly committed. It states, “Written warning violation of company policy.” The warning then states that it is a final written warning and any further violation may result in discipline up to and including termination. Davault wrote that he did not “understand which company policy I am supposed to have violated.” He then wrote that he had been told a harassment charge had been filed and concluded with the question “who was it?”

The complaint, in paragraph 19, alleges that the instruction to Davault to remove the union buttons he was wearing violated Section 8(a)(1) of the Act, and, in paragraph 30, that the warning violated Section 8(a)(3) of the Act. The complaint, in paragraph 31, alleges that the warnings of March 7 and 23 violated Section 8(a)(3) of the Act.

The March 1 warning referred to solicitation and cited the wearing of union buttons and posting of union literature. The Respondent, in its brief, concedes that the warning relating to the wearing union buttons was unlawful but claims that it was effectively retracted on March 7. I am mindful that the Board,

in *Raysel-IDE, Inc.*, 284 NLRB 879, 881 (1987), held that retraction of an unlawful instruction to remove a union button, made directly to the single employee affected, coupled with an assurance that the employee could wear the button, constituted effective repudiation under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In *Raysel-IDE*, the Board noted that the Respondent’s repudiation “occurred in a context free from other unlawful conduct.” Id. In the instant case, the Respondent engaged in virtually the same conduct less than 1 month after this incident. On March 29, Sales Supervisor Mike Leathers directed employee Chris Harris to get the pronoun stickers that he had placed on his hardhat off of his hardhat. I find that the Respondent’s attempted repudiation was not effective because it did not occur in a context free of other unlawful conduct. The Respondent violated Section 8(a)(1) of the Act by instructing Davault to remove the union buttons that he was wearing and it violated Section 8(a)(3) of the Act by warning him for that conduct.

The Respondent argues that the initial written warning, reduced to a verbal warning, for solicitation on “Company time,” changed to “working time” on the March 7 warning, was valid. There is no evidence that Davault posted union literature at any time that he should have been working. Obviously he was not working because he was in the drivers’ room and argued with Surface when he removed the literature. Contrary to the argument of the Respondent, there is no probative evidence that the second aspect of the warning prohibiting the posting of union literature was valid because there is no evidence that it occurred during working time. Davault’s credible testimony establishes that employees had previously posted personal messages at the Bayport plant. In the absence of evidence that Davault posted literature during working time, that aspect of the warning also violated Section 8(a)(1) and (3) of the Act.

The Respondent, in its brief, asserts that the warning of March 23 was proper because “another employee accused him [Davault] of harassing that employee.” There is no probative evidence either of the accusation or of the alleged harassment. The record reflects that Davault had continued to support the Union and, as accused by Surface, had been “talking to drivers and handing them [Union] fliers.” The Respondent’s brief does not address the absence of testimony by Surface, the lack of identification of the employee or employees who purportedly complained about harassment by Davault, or the absence of any evidence whatsoever regarding where, when, or how this alleged harassment occurred. Even after he received the warning, Davault had no idea what he had done. He stated on the warning that he did not “understand which company policy I am supposed to have violated.” When the reason given for an action is either false, or does not exist, Respondent has not rebutted General Counsel’s prima facie case. *Limestone Apparel Corp.*, supra. I find that the Respondent’s warning to Davault on March 23 for violating a policy that is not stated on the warning, was issued in retaliation for his union activity and violated Section 8(a)(3) of the Act.

*G. Remaining 8(a)(1) Allegations*

1. Alleged interrogation and threats by Senior Production Manager Moet

The complaint, in paragraphs 8 and 10, alleges that, on or about January 9 and 10, Senior Production Manager Topper Moet threatened to terminate employees due to their union activities. On January 10, when employee Malcolm Bennett went to get his paycheck at the Renwick plant, Moet stated that he wanted to talk with him. He went into Moet's office. Moet closed the door and asked to Bennett that there was "a rumor going around about the Union." Bennett acknowledged that he had heard of the rumor. Moet stated, "[I]f you join there's a possibility you will be terminated." Bennett responded that he guessed "they would have to fire me because I don't need no one to make my decisions for me. I can make my own decision." Moet then gave Bennett his check. As Bennett got ready to leave the office he asked Moet, "[S]o you are saying if I sign up with the Union, I'll be fired." Moet said, "[Y]es." Bennett left.

Employee Anthony Adams had a similar conversation with Moet at the Renwick plant on January 10. Adams recalled that Moet called him into his office, went over the new pay scale with him, and asked if he had any questions about it. Adams did have some questions. Moet then stated that "there was rumor about Union activity and he wanted to let me know that the Company was 100 percent against the Union and they would fight it 100 percent. And, he also told me that if any individuals wished to sign a Union card, that they would be terminated."

The Respondent presented employee Roger Longoria who testified that, when he heard Moet talking to employees, none of whom he could recall by name, the door to the office was open. He recalled only that Moet stated to those employees, and to him, that there was a rumor going around about union cards being signed, that Hanson really would not like a union, but that "we can't tell you what to sign and what not to sign." Moet denied interrogating or threatening employees, including specifically threatening that they would lose their jobs if they signed a union card. Moet was not asked to relate what he stated to the employees with whom he met nor was he asked to testify about his conversations with Bennett and Adams. He did not deny that when he spoke with Bennett the office door was closed. I credit Bennett and Adams. The Respondent, by threatening that employees who signed union authorization cards would be terminated, violated Section 8(a)(1) of the Act.

2. Alleged interrogation and threats by Production Manager Temple

The complaint, in paragraph 9, alleges that Temple interrogated employees regarding "their union activities," and threatened them with discharge. Employee James Johnson testified that, at the Sugarland plant in early January, Production Manager Mark Temple spoke with him, two other drivers, and another employee who drove a front-end loader. Temple asked if they had "heard the rumor going around that drivers are trying to organize a union." He paused, but no one responded. Temple then continued, stating that "if any guys sign anything dealing

with the Union that they could be terminated." I credit the foregoing testimony.

Temple acknowledged speaking with employees. When asked on direct examination whether there was concern about "slow downs, violence, or sabotage," Temple responded that there was and that he told employees that "any association with that would lead up to and include termination." When asked to repeat what he told employees, Temple testified he told them that "we weren't supporting the Union, did not want that Union, that anything like I said before that could happen (apparently referring to slow downs, violence or sabotage) would [lead] to . . . termination." Director of Human Resources Ashabrunner testified that she was present when Operations Manager Dorris was instructed to tell employees three things, "the Company would not support a union, the Company did not want a union, and the Company would permanently replace any economic strikers." No other supervisor who spoke with employees testified to referring to violence, and I do not credit Temple's testimony.

The inquiry as to whether employees had "heard the rumor" was not coercive. It did not seek information regarding their union activities. A negative or positive response would have denied or confirmed only knowledge of a rumor. If Temple had inquired concerning what the employees had heard, a coercive interrogation would have occurred. The absence of any coercion in the instant case is established by Temple's continuing his remarks when he received no immediate response. I shall recommend that the allegation regarding interrogation of employees regarding their union activities be dismissed.

Temple's statement that if employees signed "anything dealing with the Union that they could be terminated" was coercive and violated Section 8(a)(1) of the Act.

3. Alleged interrogation by Tanker Dispatch Manager McAfee

Tanker driver Ysobel Garza testified that, after a safety meeting in mid-March, he spoke with McAfee in the shop at the Fulton plant. Garza testified that he initiated the conversation, "I had questions to ask [about the Union]." Despite this testimony, Garza testified that McAfee asked him what he had heard "about the Union," and that he responded that he did not know, that he had not "heard nothing about the Union yet." McAfee then stated something to the effect that Garza, being an old employee, "would make the right decision." Garza then testified that, after a safety meeting in April, McAfee again inquired regarding what Garza thought about the Union and he responded that he had not "decided yet." Upon examination by counsel for the Charging Party, Garza placed both of these conversations before the election. McAfee denied interrogating any employees and testified that he recalled no conversation with Garza.

The complaint, in paragraph 21, alleges that McAfee interrogated employees in mid-March. The safety meeting in mid-March was the meeting at which McAfee removed union literature from the walls and attempted to confiscate the literature in Carriere's possession. Garza testified to these events. Garza testified to two conversations, each after a monthly safety meeting and both before the election. Thus, the first conversation, in which Garza had "questions to ask" and denied having heard

anything about the Union, had to have occurred before March. The record does not establish whether it was in January, shortly after the Respondent learned of employee union activity, or in February. In short, Garza's testimony that both conversations occurred before the election after safety meetings leaves the dates of each in doubt and places the first conversation prior to March.

In view of Garza's confusion regarding the dates to which he initially testified and acknowledgment that each conversation occurred after a monthly safety meeting before the election, I am left with a single complaint allegation of interrogation by McAfee, which he denied, occurring in mid-March. In the brief, counsel for the General Counsel does not address the confusion in dates and relies upon the initial testimony of Garza that places the first conversation in March. There has been no motion to amend the complaint to allege the second conversation. I have not credited Garza's initial testimony that the first conversation, in which he had "questions to ask" and denied knowing anything about the Union, occurred in March. The probative evidence establishes that this conversation had to have occurred before March since the second alleged interrogation occurred after a safety meeting but before the election. In the absence of any motion to amend the complaint to allege the second interrogation, the only alleged interrogation placed in issue is the first conversation, and I find that conversation had to have occurred prior to March. There is no probative evidence before me establishing whether it occurred in January or in February and, if it occurred in February, whether it occurred during the critical period after the petition was filed. There has been no motion to amend the complaint to allege an interrogation by McAfee prior to March. In view of the foregoing, I shall recommend that the allegation that McAfee interrogated employees in March be dismissed.

#### 4. Picnics and lunches

The complaint alleges, in paragraphs 24 and 26, that the holding of picnics at the Cinco and Tuf Crete plants and, in paragraph 25, the taking of some employees to lunch by Hammaker prior to the election constituted conferral of benefits in violation of the Act. There is no evidence that Hammaker solicited grievances or handed out any material to employees. In the instant case, photographs of barbecue grills at various plants and testimony regarding prior occasions when food was provided to employees establish that providing food and drink to employees was not uncommon at the Company's facilities. Although lavish and unprecedented parties on the eve of a representation elections have been found to violate the Act, there is no such evidence in this case. In *Chicagoland Television News*, 328 NLRB 367 (1999), the Board reaffirmed that it had not overruled longstanding precedent that "absent special circumstances" an election would not be set aside simply because the union or employer provides free food and drink to employees. Such parties are legitimate campaign techniques. See *Northern States Beef, Inc.*, 226 NLRB 365 (1976); *Ohmite Mfg. Co.*, 111 NLRB 888 (1955). In view of the evidence relating to past practice, I find no unlawful conferral of benefits, and I shall recommend that these allegations be dismissed.

#### 5. Allegations relating to Mike Leathers

Paragraph 28 of the complaint alleges that on March 29, Sales Supervisor Mike Leathers solicited employee grievances and impliedly promised to remedy them if the employees abandoned the Union, provided free tickets to sporting events, provided free food and beverages, and directed an employee to remove prounion stickers from his hardhat. The evidence relating to this allegation is not in substantial dispute. On March 29, employees at the Greenspoint plant had begun work at 3 a.m. in order to assure that they would complete pouring a concrete "mat" upon which a building was to be constructed. They finished work about 11 a.m. Shortly after this, Leathers invited the employees who had not yet left the plant to lunch. Five employees, Kenneth Baxter, Cornelius Brown, Charles Guidry, Charles Harris, and Willy Williams accepted his invitation. Harris rode to the restaurant with Leathers. As they were driving to the restaurant, Leathers offered, and Harris accepted, a set of tickets to a basketball game between the Houston Rockets and Phoenix Suns. The tickets, on their face, reflect a value of \$46. Leathers stated that he was not supposed to mention it, but that maybe Harris needed a new hardhat, that "I didn't need that shit on my hard hat." Harris had Teamsters stickers and nothing else on his hardhat.

At the restaurant, the employees consumed chicken wings and beer for which Leathers paid. He distributed complimentary tickets to a Houston Astros exhibition baseball game and asked the employees not to mention the tickets. After Leathers distributed the tickets, Baxter testified that he asked, "[W]hat would make us happier around the plant" and that the employees mentioned more money and access to the deer lease, a hunting preserve upon which only members of management were allowed to hunt. Harris recalled that Leathers noted that he did not know if the Union would win, and asked, "[W]hat could they do to make it better if they [the Union] did not." Harris recalled the drivers mentioning the hunting lease, the need for a restroom at Greenspoint, and other things. Leathers was jotting down what the employees mentioned and stated that he "would do his best to try and look into those things that we mentioned." He also distributed Hanson hats to the employees.

Leathers acknowledges offering to take the employees to lunch but says he contemporaneously told the employees that "we're not talking about the Union." Leathers, as a salesman, always carries company paraphernalia with him. He testified that Harris, who rode with him and saw the paraphernalia, said "share the wealth," and that he "gave him some stuff." Leathers explained that he had intended to distribute the tickets to the customer at the mat pour but that the customer did not want them. He gave the basketball tickets to Harris and the tickets to the exhibition baseball game to the other employees, that "nobody really wanted them." He acknowledged that he made notes of the concerns the employees stated but testified that, although the employees shared some of their concerns, he did not solicit them. I do not credit this testimony. Baxter and Harris confirm that Leathers asked about employee concerns and Leathers admits that he wrote down those concerns. Leathers denied that he promised anything, stating that the employees knew that all he could do was "tell somebody about their situation." He acknowledged speaking with Harris about his hard-

hat, but places the conversation after lunch. He admits stating that he told Harris that “from a marketing perspective, a customer’s perspective, once all this stuff is over we need to lose the stickers.”

The Board, in *B & D Plastics*, 302 NLRB 245 (1991), sets out the objective criteria for evaluation of the granting of benefits including the size of the benefit, the number of employees receiving it, how employees reasonably would view the purpose of the benefit, and the timing of the benefit. In the instant case, the company clothing is not alleged as a violation. Only one employee, Harris, received tickets that had any value. The tickets to the exhibition baseball game were complimentary. The food and drink provided was not lavish. Thus, I shall recommend that the allegation regarding the provision of tickets and food and drink benefits be dismissed. Notwithstanding the foregoing recommendation, the context in which the food, drink, tickets, and merchandise was bestowed is significant in evaluating the allegation relating to the solicitation of grievances with an implied promise to remedy them. Contemporaneously with the bestowal of food, drink, tickets, and merchandise, Leathers solicited grievances and specifically took notes regarding the employees’ comments. The actions of Leathers clearly implied to the employees that “management would react favorably to the underlying problems that gave impetus to the organization drive.” *Kinney Drugs*, 314 NLRB 296, 299 (1994).<sup>4</sup> I find that the solicitation of grievances, accompanied by the gift giving and note taking, carried with it an implied promise to favorably address the matters that the employees raised and that, in so doing, the Respondent violated Section 8(a)(1) of the Act.

I credit Harris that Leathers directed him to get the union stickers off of his hardhat. Even if I were to credit Leathers, the statement that Harris needed to “lose” the stickers interfered with employee rights to support a labor organization and violated Section 8(a)(1).

#### 6. Alleged threat of closure

Paragraph 23 of the complaint alleges that Vice President Van Til threatened plant closure if the employees selected the Union as their collective-bargaining representative. The alleged threat is contained in a six-page document distributed to employees in which Van Til addresses questions that he states “came directly from the Teamsters.” The relevant question is question 5 which asks whether Van Til is aware that the benefits of drivers under Teamsters’ contracts are “substantially better in all cases than ours?” Van Til gives the following response:

This is not true in the first place and it wouldn’t matter if it was. Wages and benefits are determined by the local market. Again, the wage and benefits package provided [by Hanson] to the Houston area drivers is around the best in this area. If the Teamsters insist on all they seem to promise by their question I guarantee a strike and if the company lost the strike it would have to close.

<sup>4</sup> This case was remanded to the Board, but the relevant finding was not disturbed. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419 at fn. 5 (2d Cir. 1996).

The General Counsel, citing *Garney Morris, Inc.*, 313 NLRB 101, 114 (1993) and *Mediplex of Danbury*, 314 NLRB 470, 471 (1994), argues that Van Til’s response was unsupported by any evidence establishing that the comments were a prediction of “demonstrably likely consequences.” In *Mediplex*, the Board noted that the reference to closure, which was joined with a threat to discharge strikers, “was unaccompanied by any objective factual information which . . . might have identified it as a lawful prediction of economic consequence devoid of retaliatory content.” *Id.*

Van Till’s response, at the least, threatens the employees with futility in that he gives a “guarantee” of a strike if the Union should seek the wages and benefits to which it referred in the campaign and closure if the Union should win that guaranteed strike. I agree with the General Counsel, and I find that, in absence of citation of objective factual information, Van Till’s response threatened plant closure in response to the employees’ selection of the Union as their collective-bargaining representative in violation of Section 8(a)(1) of the Act.

#### 7. Allegations relating to LOD (Lorry Owned [by] Driver) employees

In early or mid-February, batchman Ray Ozzene called Kenneth Allen to the office of the Renwick plant. With no exchange of pleasantries, Ozzene stated to Allen that, if the Union came in, the LODs could lose their jobs. Allen, who is not an LOD employee, smiled and left. Ozzene did not testify. Ozzene gave no “objective factual information” upon which this statement was predicated. It was simply a bare threat. Consistent with complaint paragraph 16(c), I find that this constituted a threat to terminate LOD employees if the employee selected the Union as their collective-bargaining representative.

The complaint, in paragraph 27, alleges that on or about March 28, President Clifford Hahne, at the Jersey Village plant, offered to reinstate the LOD program. Although Hahne did not testify, the Respondent argues that no such statement would have been made because the LOD program had not been discontinued. Employee Davault testified that, about 3 years ago, he inquired about the LOD program and was told to talk to Wayne Franciso, the Pioneer management official over Pioneer’s LOD employees. Franciso told Davault that Pioneer had discontinued the program. Notwithstanding this 3year old representation by a Pioneer manager, uncontradicted testimony by Van Til establishes that two new LOD drivers were hired by Hanson in 2000, including Anthony Roundtree in October 2000. The only employee to testify to Hahne’s alleged comment at Jersey Village was Jorge Gutierrez. He placed employee Joel Lebron, whom I have previously credited, at the meeting at which Hahne spoke. Lebron was not asked about the alleged comment by Hahne. In the absence of corroboration of Gutierrez and in view of the credible testimony of Van Til that the program had not been discontinued, I find that the General Counsel has not established by the greater weight of the evidence either that the program had been discontinued or that Hahne offered to reinstate the program. I shall recommend that this allegation be dismissed.

### *H. Objections to the Election*

The Petitioner filed Objections to Conduct Affecting the Election, many of which are coextensive with the allegations of the complaint. The Petitioner urges that I also find certain conduct that is not coextensive with any complaint allegation to be objectionable.

#### 1. Electioneering

Objection III alleges that Plant Manager Jim Nowakowski engaged in electioneering by standing near the door to the drivers' room in which voting was taking place at the Greenspoint plant. Employees got into line to vote inside the drivers' room. Employees testified that Nowakowski was outside the door, from 6 to 15 feet away, depending upon the witness, from 5 until about 5:15 a.m. Employee Gutierrez, whose testimony reflects that he requested that Nowakowski move at about 5:15 a.m., confirms that he did so shortly after he made the request. Nowakowski recalls no conversation with Gutierrez. He testified that he was in the area to assure that the Greenspoint drivers reported to the Fulton plant, an instruction that had also been given the previous day. Nowakowski never entered the voting place. He acknowledges casually greeting employees and reminding them to go to Fulton. There is no evidence that he engaged in any electioneering. I recommend that this objection be overruled. *Standard Products Co.*, 281 NLRB 141, 164 (1986).

#### 2. Payment for attendance

In Objection IV(i), the Petitioner alleges payment to employees for attending nonmandatory antiunion meetings. There were a total of five meetings held at different locations. Employees who elected to attend the meetings, which were announced by postings and managers, were left on the clock and were also paid \$25 to assure that they did not lose earnings as a result of loads they did not deliver pursuant to the safe load bonus component of the new pay system. The Petitioner has not filed a brief, thus I am unaware of the basis for the claim that the Employer's compensation of employees for attendance at these meetings during working time was objectionable. Employees are entitled to full compensation for time spent in antiunion meetings held during working hours. See *Comet Electric*, 314 NLRB 1215, 1216 (1994). In the instant case, no employees were excluded from the non-mandatory meetings. There is no evidence that any employee was either over compensated or under compensated as a result of attendance at any meeting. I recommend that this objection be overruled.

#### 3. Transfer of James Johnson

In Objection IV(k), the Petitioner alleges the transfer of James Johnson and, in objection IV(o), the Petitioner alleges the refusal to permit Johnson to attend a company barbecue. The probative evidence establishes that Johnson had been assigned light duty at the Sugarland plant over a period of 6 months after suffering a back injury. In December 2000, Johnson and Safety Director Ray Rucker had a conversation in which Rucker noted that Johnson's injury had been prolonged and that the Company needed to "have the doctor make some decision on you." Johnson acknowledged that his back was continuing to hurt and that he knew that "we need[ed] to do

something." Rucker received the impression that Johnson did not want to undergo surgery. Rucker testified that he was thinking about retraining, and that he assured Johnson that something would be found for him. Johnson does not recall Rucker mentioning anything regarding retraining. He does recall that Rucker stated that they needed to "put a closure on this." He testified that Rucker stated that "we do not . . . have another position for you." Notwithstanding this comment, Johnson remained on light duty at the Sugarland plant. On February 28, he was transferred from the Sugarland plant and, thereafter, received various light-duty assignments at locations other than the Sugarland plant. The record reveals that no employee had previously been transferred and retransferred in the same manner as Johnson, but there is no evidence that any employee had previously suffered an injury that continued to incapacitate that employee for as long as Johnson's injury had incapacitated him. Although there is much testimony regarding whether the position of batchman was within Johnson's medical restrictions that limited his lifting to ten pounds and whether the Respondent failed to develop an appropriate retraining program for him, the Petitioner's objection is simply that Johnson was transferred. There is no charge or complaint allegation that the transfer of Johnson violated the Act in any way. Production Manager Mark Temple's testimony that he had no light-duty work for Johnson at the Sugarland plant is uncontradicted. There is no probative evidence that the Respondent refused to permit Johnson to attend a company barbecue. I recommend that both of these objections be overruled.

#### 4. Captive audience

Objection IV(q) alleges that the Employer held a captive audience meeting on the eve of the election at its Bayport facility. The evidence upon which the Petitioner relies in support of this objection is the testimony of employee Davault that, on the day before the election, a company salesman identified as Doug came into the drivers' room at the Bayport plant. Davault and two other employees were present. The salesman noted that he had come there because union representatives were supposedly trying to get onto the premises at other plants. Davault noted that would not happen at Bayport because it was a "yes" plant. The salesman made a couple of antiunion comments referring to corruption and a union being bad for the Company and left. The foregoing evidence reveals electioneering by an agent of the Respondent to three employees who could have left the drivers' room at any time on the day before the election. There is no evidence of a captive audience meeting within 24 hours of the election.

I have found that, after the petition was filed and prior to the election, the Respondent engaged in violations of Section 8(a)(1) and (3) of the Act. This conduct parallels various objections filed by the Union. Objection I alleges the threat of plant closure in the question and answer document, Objections IV(e) and (j) allege the removal of union literature, Objections IV(f), (g), (h), and (n) allege the unlawful discipline of Davault on March 1, 7, and 23, and of Carriere on March 7.

I find that the foregoing violations of the Act that occurred during the critical preelection period and that correspond to the Union's objections interfered with the employees' free choice

of representation and that the election must be set aside and a new election held.

#### CONCLUSIONS OF LAW

1. By threatening employees with discharge if they did not cease engaging in protected concerted activity regarding wages and working condition, by removing the blackboard at its Fulton tanker drivers' room, by removing prounion literature at the Renwick and Bayport ready-mix plants at which employees had been permitted to post nonwork-related materials, by attempting to confiscate prounion literature from an employee, by prohibiting the posting of prounion literature at plants at which employees had been permitted to post nonwork literature and prohibiting discussing the Union on company property, by prohibiting employees from wearing prounion insignia, by threatening employees with termination for signing union authorization cards, by soliciting grievances and impliedly promising to remedy them, by threatening plant closure if employees selected the Union as their collective-bargaining representative, by threatening termination of LOD employees, and by warning employees because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a warning to employee Jimmy Carriere on March 7 and by issuing warnings to employee Frank Davault on March 1, 7, and 23 because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily warned Jimmy Carriere and Frank Davault, it must rescind the unlawful warnings and advise the employees of the rescissions.

The Respondent must replace the blackboard at its Fulton tanker drivers' room.

The Respondent must post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Hanson Aggregates Central, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they do not cease engaging in protected concerted activity regarding wages and working conditions.

(b) Removing the blackboard at the Fulton tanker driver room thereby depriving employees of a benefit that they had

previously enjoyed, removing prounion literature at the Renwick and Bayport ready-mix plants at which employees had previously been permitted to post nonwork-related materials, prohibiting the posting of prounion literature at its Fulton, Renwick, and Bayport ready-mix plants at which employees had previously been permitted to post nonwork literature,<sup>6</sup> attempting to confiscate prounion literature from an employee, and prohibiting discussion of the Union on company property.

(c) Prohibiting employees from wearing prounion insignia.

(d) Soliciting employee grievances and impliedly promising to remedy them in order to dissuade them from supporting the Union.

(e) Threatening plant closure if employees selected the Union as their collective-bargaining representative.

(f) Threatening termination of employees who sign union authorization cards.

(g) Threatening the termination of LOD employees if employees selected the Union as their collective-bargaining representative.

(h) Warning or otherwise discriminating against any employee for supporting, International Brotherhood of Teamsters Local Union 988, AFL-CIO, CLC or any other union.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files the unlawful warnings issued to Jimmy Carriere and Frank Davault and, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

(b) Within 14 days from the date of the Board's Order, replace the blackboard in the tanker drivers' room upon which employees had been permitted to write nonwork-related messages.

(c) Within 14 days after service by the Region, post at its facilities in Houston, Texas, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup> Compliance with this provision of the Order will require restoration of the status quo prior to union activity by providing some method of posting. The removal of bulletin boards was not alleged at these locations; thus, no specific method for compliance is being prescribed.

<sup>7</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 10, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 16-RC-10286 is severed from Cases 16-CA-20885 et al. and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice.

Dated, Washington, D.C. November 30, 2001

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with discharge for engaging in protected concerted activity regarding wages and working conditions.

WE WILL NOT deprive you of the benefit of a blackboard in the tanker drivers' room, remove non-work related material posted by you at the Renwick and Bayport ready-mix plants at which you had previously been permitted to post nonwork-related materials, promulgate rules prohibiting the posting of prounion literature the Fulton, Renwick, and Bayport ready-mix plants at which you had previously been permitted to post non-work-related materials, or prohibit you from discussing the Union on company property.

WE WILL NOT attempt to confiscate prounion literature from any of you.

WE WILL NOT prohibit you from wearing prounion insignia.

WE WILL NOT solicit your grievances and imply that we will remedy them in order to dissuade you from supporting the Union.

WE WILL NOT threaten that you will be terminated if you sign a union authorization card, that LOD employees will be terminated if you select the Union as your collective-bargaining representative, or that we will close if you select the Union as your collective-bargaining representative.

WE WILL NOT warn or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters Local Union 988, AFL-CIO, CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, replace the blackboard in the tanker drivers' room at the Fulton plant.

WE WILL, within 14 days from the date of the Board's Order, remove from our files the unlawful warnings issued to Jimmy Carriere and Frank Davault and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

HANSON AGGREGATES CENTRAL, INC.